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Supreme Court, U.S.
FILED

No. 05-432 SEP 30 2005

OFFICE OF THE

In The
Supreme Court of the United States

PHILIP M. KLEINSMITH,

Petitioner,

v.

JOSEPH L. RICH, DISTRICT JUDGE,
MCKINLEY COUNTY, NEW MEXICO,
DISTRICT COURT,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of The
State Of New Mexico**

PETITION FOR WRIT OF CERTIORARI

Petitioner

*Pro se, Member of the
New Mexico Bar and
Counsel of Record in
All Proceedings Below:*

PHILIP M. KLEINSMITH
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QUESTIONS PRESENTED FOR REVIEW

1. Only on the basis of NMSA 32A-6-12G and the Trial Court's ("District Court") 10/28/02 Order, did the District Court have jurisdiction to appoint Mr. Kleinsmith as the child's attorney?

2. If Question 1 is analyzed in the light of Section 3, Article VI of the New Mexico Constitution, was the appointment of Mr. Kleinsmith constitutional?

3. If Question 1 is analyzed in the lights of federal involuntary servitude, due process, equal protection, interstate commerce and privileges and immunities was the appointment of Mr. Kleinsmith constitutional?

4. Was Mr. Kleinsmith precluded from his constitutional arguments by the doctrine of collateral estoppel?

**LIST OF PARTIES TO THE PROCEEDINGS
AND CORPORATE DISCLOSURE STATEMENT**

Petitioner-Contemptor: Philip M. Kleinsmith, Esq.

Judge: Hon. Joseph L. Rich

The Petitioner states that: he is not a corporation; his law practice is incorporated; neither he nor his corporate law practice is owned in any part by any other corporation (public or private); and, he is the sole owner of his corporate practice.

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A. CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

Published in the New Mexico Bar Bulletin. The New Mexico Supreme Court's Order quashing its own Writ of Certiorari orders that the New Mexico Court of Appeals decision be reported which has not occurred yet.

B. STATEMENT FOR THIS COURT'S JURISDICTION

1. *Date of New Mexico Supreme Court's Order Quashing its own Writ of Certiorari*: July 5, 2005.
2. *Rehearing Date*: None requested.
3. *Cross-Petition* (Rule 125): None known.
4. *Statutory Basis for Review*: Title 28, Section 1258, USCA
5. *Rule 29.4(b) and (c) Notification*: None Required.

C. CONSTITUTIONAL PROVISIONS INVOLVED

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (*United States Constitution*, 14th Amendment, § 1)

"The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior

ts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof." (*New Mexico Constitution*, Article VI, § 3).

"Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." (*United States Constitution*, 14th Amendment, § 1).

"The Congress shall have the power . . . to regulate commerce . . . among the several states . . ." (Section 8, Article I of the *United States Constitution*).

"The citizens of each state shall be entitled to all privileges and immunities of the citizens of every other state." (Section 2, Article IV of the *United States Constitution*).

D. STATEMENT OF THE CASE

This case began on October 28, 2002, when Judge Rich, District Judge of McKinley County, New Mexico District Court ("District Court") filed and adopted his Administrative Order. ("10/28/02 Order" App 38-40). The

10/28/02 Order set up a methodology for the appointment of attorneys in *pro bono* matters. The attorneys who were subject to it were resident McKinley County attorneys and non-resident McKinley County attorneys, when such a non-resident attorney filed more than three cases in the preceding year. The 10/28/02 Order was not approved, filed and published as required by the following rule of the New Mexico Supreme Court:

"A. Approval Procedure. Each district court by action of the judge of such, or of a majority of the judges thereof, may from time to time recommend to the Supreme Court local rules governing its practices in civil cases. Copies of the proposed local rules and amendments shall be submitted to the Supreme Court and to the chair of the Supreme Court's Rules of Civil Procedure for the District Courts Committee ("the committee") for review. If the proposed local rule amends an existing local rule, a mark-up copy shall be submitted to the Supreme Court and the committee. The committee shall review any proposed local rule for content, appropriateness, style and consistency with the other local rules, statewide rules and forms and the laws of New Mexico, and shall advise the Supreme Court and the chief judge of the district of its opinion and recommendation regarding the proposed rules. Local rules and forms shall not conflict with, duplicate or paraphrase statewide rules or statutes. The civil procedure committee shall consult with the chief judge, or the chief judge's designee, regarding any revisions recommended by the committee. Following such consultation, the committee shall report its recommendations to the Supreme Court, and shall bring to the Court's attention any differences of opinion between the committee

and the chief judge. No local rule shall take effect unless:

- (1) approved by an order of the Supreme Court;
- (2) filed with the clerk of the Supreme Court; and
- (3) published in the bar bulletin or in the judicial volumes of the NMSA 1978.

B. Definition. A "local rule" whether called a rule, order other directive, is a rule which governs the procedure in a judicial district in suits of a civil nature. An order, which is consistent with local rules, statewide rules and forms and the laws of New Mexico, that is entered in an individual case and served on the parties shall not be considered a local rule." (*New Mexico Rules of District Court Civil Procedure*, Rule 1-083).

Mr. Kleinsmith, whose only office and residence is and was in Colorado Springs, Colorado (about 300 miles from Gallup, NM, where the District Court sits), was subject to the 10/28/02 Order because he had filed at least three foreclosures in the District Court in 2002. Mr. Kleinsmith is and was at that time an attorney: licensed in twenty-four states; whose practice has been limited to real estate foreclosures for at least ten years, and; who has no experience in mental health matters. (App. 4, 83).

Within two months of the adoption of the 10/28/02 Order, on December 18, 2002, the District Court, pursuant to its 10/28/02 Order and NMSA 32A-6-12G appointed (12/18/02 Order) Mr. Kleinsmith to represent a child who was a mental health patient. (App. 3). The duties imposed on such an attorney are:

"Within seven days of the admission, an attorney representing the child pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act [32A-6-1 to 32A-6-22 NMSA 1978] shall meet with the child. At the meeting with the child, the attorney shall explain to the child the following:

- (1) the child's right to an attorney;
- (2) the child's right to terminate his voluntary admission and the procedures to effect termination;
- (3) the effect of terminating the child's voluntary admission and options of the physician and other interested parties to the petition for an involuntary admission; and
- (4) the child's rights under the provisions of the Children's Mental Health and Developmental Disabilities Act, including the right to:
 - (a) legal representation;
 - (b) a presumption of competence;
 - (c) receive daily visitors of the child's choice;
 - (d) receive and send uncensored mail;
 - (e) have access to telephones;
 - (f) follow or abstain from the practice of religion;
 - (g) a humane and safe environment;
 - (h) physical exercise and outdoor exercise;
 - (i) a nourishing, well-balanced, varied and appetizing diet;

- (j) medical treatment;
- (k) educational services;
- (l) freedom from unnecessary or excessive medication;
- (m) individualized treatment and habilitation; and
- (n) participation in the development of the individualized treatment plan and access to that plan on request.

If the attorney determines that the child understands his rights and that the child voluntarily and knowingly desires to remain as a patient in a residential treatment or habilitation program, the attorney shall so certify on a form designated by the supreme court." (NMSA 32A-6-12I & J).

The 12/18/02 Order was faxed to Mr. Kleinsmith on December 18, 2002.

Within hours of receiving the faxed order and petition, Mr. Kleinsmith telephoned the clerk's office. Mr. Kleinsmith stated that he could not represent the child as he was going on vacation the next day, December 19, 2002, and would not return until December 26, 2002. The deputy clerk suggested that he contact the mental health facility and speak to the child over the phone. He replied: "I don't even give service that fast on my paying clients." When Mr. Kleinsmith persisted in asking to be relieved, the deputy clerk explained that she did not have the authority to relieve him of his appointment and that he should fax a motion to withdraw and a proposed order to the District Court. (App. 4, 56).